CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 29 AUGUST 16, 1995 NO. 33

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decisions

(T.D. 95–59)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR JULY 1995

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: Tuesday, July 4, 1995.

China (Taiwan) N.T. dollar:

July 1, 1995	$0.038715
July 2, 1995	.038715
July 3, 1995	.038610
July 4, 1995	.038610
July 5, 1995	.038640
July 6, 1995	.038640
July 7, 1995	.038565
July 8, 1995	.038565
July 9, 1995	.038565
July 10, 1995	.038153
July 11, 1995	.038212
July 12, 1995	.038197
July 13, 1995	.038153
July 14, 1995	.038197
July 15, 1995	.038197
July 16, 1995	.038197
July 17, 1995	.038023
July 18, 1995	.037879
July 19, 1995	.037893
July 20, 1995	.037908
July 21, 1995	.037850
July 22, 1995	.037850
July 23, 1995	.037850
July 24, 1995	.037736
July 25, 1995	.037608
July 26, 1995	.037453
July 27, 1995	.037821
July 28, 1995	.037850
July 29, 1995	.037850
July 30, 1995	.037850
July 31, 1995	.037764

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for July 1995 (continued):

Greece drachma:

July 1, 1995	$0.004441
July 2, 1995	.004441
July 3, 1995	.004452
July 4, 1995	.004452
July 5, 1995	.004457
July 6, 1995	.004446
July 7, 1995	.004419
July 8, 1995	.004419
July 9, 1995	.004419
July 10, 1995	.004413
July 11, 1995	.004393
July 12, 1995	.004399
July 13, 1995	.004428
July 14, 1995	.004420
July 15, 1995	.004420
July 16, 1995	.004420
July 17, 1995	.004419
July 18, 1995	.004435
July 19, 1995	.004431
July 20, 1995	.004453
July 21, 1995	.004458
July 22, 1995	.004458
July 23, 1995	.004458
July 24, 1995	.004445
July 25, 1995	.004417
July 26, 1995	.004448
July 27, 1995	.004463
July 28, 1995	.004467
July 29, 1995	.004467
July 30, 1995	.004467
July 31, 1995	.004451

South Korea won:

July 1, 1995	$0.001314
July 2, 1995	.001314
July 3, 1995	.001314
July 4, 1995	.001314
July 5, 1995	.001316
July 6, 1995	.001317
July 7, 1995	.001318
July 8, 1995	.001318
July 9, 1995	.001318
July 10, 1995	.001315
July 11, 1995	.001315
July 12, 1995	.001315
July 13, 1995	.001315
July 14, 1995	.001316
July 15, 1995	.001316
July 16, 1995	.001316
July 17, 1995	.001312
July 18, 1995	.001312
July 19, 1995	.001314
July 20, 1995	.001316
July 21, 1995	.001317
July 22, 1995	.001317
July 23, 1995	.001317

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for July 1995 (continued):

South Korea won (continued):

July 24, 1995	$0.001317
July 25, 1995	.001317
July 26, 1995	.001317
July 27, 1995	.001317
July 28, 1995	.001318
July 29, 1995	.001318
July 30, 1995	.001318
July 31, 1995	.001317

Dated: August 2, 1995.

FRANK CANTONE,
Chief,
Customs Information Exchange.

(T.D. 95–60)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR JULY 1995

There were no variances from the quarterly rates for July 1995.

Dated: August 2, 1995.

FRANK CANTONE,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, August 2, 1995.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF "ORIMULSION"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking New York Ruling Letter (NYRL) 857187, dated November 15, 1990, concerning the classification of a product known as "Orimulsion", composed of bitumen, water and a surfactant and used as a boiler fuel.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after October 16, 1995.

FOR FURTHER INFORMATION CONTACT: Norman W. King, Food and Chemicals Classification Branch, Office of Regulations and Rulings (202) 482–7097.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On June 21, 1995, Customs published in the CUSTOMS BULLETIN, Volume 29, No. 25, a notice of a proposal to revoke NYRL 857187, dated

November 15, 1990, which held that a product known as "Orimulsion" was classified in subheading 2715.00.0000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for bituminous mixtures based on natural bitumen.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking NYRL 857187 to reflect the proper classification of "Orimulsion". Headquarters Ruling letter 957455 revoking NYRL 857187, is set forth in the attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: July 27, 1995.

JOHN B. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 27, 1995.

CLA–2 R:C:F 957455 K
Category: Classification
Tariff No. 2714.90.00

MICHAEL D. SHERMAN, ESQ.
JOHN B. BREW, ESQ.
COUNSEL FOR BITOR AMERICA CORP.
COLLIER, SHANNON, RILL & SCOTT
3050 K Street, N.W., Suite 400
Washington, DC 20007

Re: Revocation of New York Ruling Letter (NYRL) 857187; "Orimulsion".

DEAR SIRS:

In your letter of December 21, 1994, you requested that we revoke NYRL 857187, dated November 15, 1990, which held that a product known as "Orimulsion" from Venezuela, was classified as bituminous mixtures based on natural asphalt, on natural bitumen, on petroleum bitumen, on mineral tar or on mineral tar pitch, in subheading 2715.00.00, Harmonized Tariff of the United States (HTSUS), free of duty. You further requested that we rule that the product is classified as other bitumen, natural, in subheading 2714.90.00, HTSUS, also free of duty. This letter is to inform you that NYRL 857187 no longer reflects the views of the Customs Service and is revoked in accordance with section 177.9(d) of the Customs Regulations (19 CFR 177.9(d)). Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), hereinafter, section 625), notice of the proposed revocation of NYRL

857187 was published on June 21, 1995, in the CUSTOMS BULLETIN, in Volume 29, No. 25. The following represents our position.

Facts:

The product contains 70 percent natural bitumen, 30 percent water, and less than 1 percent of a surfactant and it is used as a boiler fuel, primarily for electric utilities. It is stated that the water is added for transportation purposes and that the bitumen remains in its natural state.

Issue:

The issue is whether the product is a natural bitumen or a manufactured product based on bitumen.

Law and Analysis:

Subheading 2714.90.00, HTSUS, provides for bitumen, natural, whereas subheading 2715.00.00, HTSUS, provides for bituminous mixtures based on natural bitumen.

The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represents the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and General Rules of Interpretation of the HTSUS. The EN represents the considered views of classification experts of the Harmonized System Committee. While the Customs Service is not bound by the EN in interpreting the HTSUS, the EN are to be given considerable weight in Customs' interpretation of the HTSUS. It has, therefore, been the practice of the Customs Service to consult the terms of the EN when interpreting the HTSUS.

In November 1994, the 14th Session of the Harmonized System Committee decided to amend the ENs to headings 27.14 and 27.15. The changes, effective February 1, 1995, are reported in Annex L/7 to document 38.960, as follows:

CHAPTER 27

Page 222. Heading 27.14.

1. *Third paragraph. New second and third sentences.*

Insert the following new second and third sentences:

"The mere addition of water to natural bitumen does not change the classification of the product for the purposes of heading 27.14. Further, the heading also includes dehydrated and pulverized natural bitumen dispersed in water and containing a small amount of an emulsifier (surfactant), added solely to facilitate safety, handling or transport."

2. *Fifth paragraph. Exclusions.*

Insert the following new exclusion (e):

"(e)Bituminous mixtures based on natural bitumen with added substances, other than water and emulsifiers (surfactants) necessary solely to facilitate safety, handling or transport *(heading 27.15).*"

Reletter present exclusion "(e)" as "(f)".

Page 223. Heading 27.15. Third paragraph. Exclusions.

Insert the following new exclusion (d)

"(d) Dehydrated and pulverized natural bitumen dispersed in water and containing a small amount of an emulsifier (surfactant), added solely to facilitate safety, handling or transport *heading 27.14).*"

Reletter present exclusions "(d)" and "(e)" as "(e)" and "(f)", respectively.

The United States supported the amendments to the EN and the amendments make it clear that natural bitumen with the mere addition of water and the addition of a small amount of emulsifier (surfactant) to facilitate safety in transportation is not a manufactured product so as to preclude classification in heading 2714. Accordingly, the product, known as "Orimulsion" described above, is classified as other bitumen, natural, in subheading 2714.90.00, HTSUS.

Holding:

The product known as "Orimulsion" containing 70 percent natural bitumen, with the addition of 30 percent water, and less than 1 percent of a surfactant for safety in transportation purposes and used as a boiler fuel, is classified in subheading 2714.90.00, HTSUS, with a general free rate of duty.

NYRL 857187, dated November 15, 1990, is revoked.

In accordance with 19 U.S.C. 1625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), of the Customs Regulations (19 CFR 177.10(c)(1)).

JOHN B. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF RULING LETTER RELATING TO CLASSIFICATION OF A WOMAN'S COTTON KNIT ROBE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of a woman's cotton knit robe. Notice of the proposed modification was published June 21, 1995, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after October 16, 1995.

FOR FURTHER INFORMATION CONTACT: Cynthia Reese, Textile Classification Branch, (202–482–7094).

SUPPLEMENTARY INFORMATION:

BACKGROUND

District Decision (DD) 806295 of February 22, 1995, classified a woman's cotton knit robe as a knit dress, of heading 6204, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). After review, Customs believes the garment is properly classified as a woman's cotton knit robe of heading 6208, HTSUSA. On June 21, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, Number 25, proposing to modify DD 806295.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested par-

ties that Customs is modifying DD 806295. Headquarters Ruling Letter 957977 modifying DD 806295 is set forth as an attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations 177.10(c)(1)).

Dated: July 25, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 25, 1995.

CLA–2 R:C:T 957977 CMR
Category: Classification
Tariff No. 6108.91.0030

MS. KATHY REDEY
EDDIE BAUER, INC.
15010 N.E. 36th Street
Redmond, WA 98052

Re: Modification of DD 806295 of February 22, 1995; classification of a woman's knit robe.

DEAR MS. REDEY:

This ruling is in response to your letter of March 16, 1995, requesting Customs reconsider the classification of a woman's knit garment classified in District Decision (DD) 806295 as a woman's knit dress of heading 6104, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). You claim the garment is a woman's knit robe and should be classified in heading 6108, HTSUSA. A sample garment was received with your submission.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed modification of DD 806295 was published June 21, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 25.

Facts:

The garment at issue, item 10672, is identified by you as a jersey pullover robe. The garment is made of 100 percent cotton brushed jersey knit fabric. The pullover garment is ankle-length and features a hood, long sleeves, a large double patch pocket in the front at about the waist to hip region (a kangaroo pouch pocket), nine inch slits on both sides extending upward from the bottom of the garment, and a plain, hemmed bottom. The garment is sized for a roomy, loose fit.

The garment will be manufactured in Hong Kong and entered through the ports of Seattle, Chicago and Columbus.

Issue:

Is item 10672 properly classified as a woman's knit dress of heading 6104, HTSUSA, or as a woman's knit robe of heading 6108, HTSUSA?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRIs). GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to [the remaining GRIs taken in order]."

Heading 6104, HTSUSA, provides for, among other things, women's knit dresses. Heading 6108, HTSUSA, provides for, among other things, women's knit bathrobes, dressing gowns and similar articles. The Explanatory Notes (EN) to the *Harmonized Commodity Description and Coding System*, the official interpretation of the tariff at the international level, do not offer any helpful elaboration regarding knit dresses or robes.

The *Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories*, CIE 13/88, (hereinafter *Guidelines)* were developed and revised in accordance with the HTSUSA to insure uniformity, to facilitate statistical classification, and to assist in the determination of the appropriate textile categories established for the administration of the Arrangement Regarding International Trade in Textiles. They offer guidance to the trade community and Customs personnel as to various characteristics of garments. It is important, however, to remember that the *Guidelines* are not hard and fast rules, but **guidance** in drawing distinctions between classes of garments. As the EN offer no assistance in this case, it is proper to look to the *Guidelines*.

The *Guidelines* indicate that a dress is considered to be a one-piece garment appropriate for wear without other outer garments. In regard to robes, the *Guidelines* identify certain physical characteristics generally found in these garments, such as, looseness, long length (generally reaching to mid-thigh or below), and the usual presence of sleeves and a frontal opening. The *Guidelines* also indicate that these garments are worn in the home for comfort and are inappropriate for wear on social occasions in and outside the home.

The *Essential Terms of Fashion* by Charlotte Mankey Calasibetta defines "dress", in relevant part, at page 48, as: "Customarily the main item of apparel worn by women and girls in the Western hemisphere. May be made in one piece, cut in two pieces and joined with a waistline seam, or made in two separate pieces with each piece finished separately. * * *" From the same source, "robe" is defined, in relevant part, at page 156, as: "Informal clothing usually styled like a loose coat; may be sashed, buttoned, zipped, or hang loose. worn over pajamas or nightgown, at the beach, or for informal entertaining at home. Current meaning of the word is a shortened form of the word *bathrobe* or *dressing robe."*

We agree with your arguments that the garment has characteristics associated with robes and has the appearance of a robe. You submit this garment will be sold only via your catalog and will be described therein as a "pullover robe" and marketed as a robe. The presentation in the catalog makes clear the intended use of the garment as a robe and we agree that all factors indicate it will be principally used as such.

Holding:

Item 10672 is properly classified as a woman's knit cotton robe in subheading 6108.91.0030, HTSUSA, textile category 350, dutiable at 9 percent *ad valorem*.

DD 806295 is modified to accord with the above.

In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels),* an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF RULING LETTER RELATING TO CLASSIFICATION OF WOMEN'S COTTON FLANNEL BOXERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of a pair of women's cotton flannel boxer shorts. Notice of the proposed modification was published June 21, 1995, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after October 16, 1995.

FOR FURTHER INFORMATION CONTACT: Cynthia Reese, Textile Classification Branch, (202–482–7094).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Headquarters Ruling Letter (HRL) 956506 of September 27, 1994, classified a pair of women's cotton flannel boxer shorts as women's cotton shorts of subheading 6204.62.4055, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). A subsequent ruling request by another party on the identical garment led to a decision that the garment was properly classified as women's other sleepwear, similar to pajamas and nightdresses in subheading 6208.91.3010, HTSUSA. In the interest of uniformity, Customs is modifying HRL 956506. On June 21, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, Number 25, proposing to modify HRL 956506.

One comment was received in response to the notice of proposed modification. The commentator believed Customs should take note of, and make reference to, a case recently decided in the Court of International Trade, *Inner Secrets/Secretly Yours, Inc. v. United States*, Slip Op. 95–60 (CIT 1995). As Customs believes that decision was based upon the specific facts presented regarding the specific merchandise before the court and not all boxer shorts, we see no need to reference it in our modification of HRL 956506.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying HRL 956506.

HRL 958009 modifying HRL 956506 is set forth as an attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations 19 CFR 177.10(c)(1)).

Dated: July 25, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 25, 1995.

CLA–2 R:C:T 958009 CMR
Category: Classification
Tariff No. 6208.91.3010

MR. WILLIAM ORTIZ
S.J. STILE ASSOCIATES LTD.
153–66 Rockaway Boulevard
Jamaica, NY 11434

Re: Modification of Headquarters Ruling Letter (HRL) 956506 of September 27, 1994; classification of women's woven flannel boxers.

DEAR MR. ORTIZ:

On September 27, 1994, Customs issued a ruling to you, HRL 956506, which you requested on behalf of Stafford Inc., classifying a pair of women's woven flannel boxers as shorts of subheading 6204.62.4055, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). As the result of a later request for a ruling on the identical garment by another party, Customs has reviewed the decision in HRL 956506 and found the outcome in error.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed modification of HRL 956506 was published June 21, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 25.

Facts:

The garment at issue in HRL 956506, style 2139, is described as a ladies 100 percent cotton boxer short. The garment is made of 100 percent cotton woven flannel fabric. It features an elasticized waist with the elastic exposed on the interior of the garment, a fake fly and typical boxer silhouette. The measurement of the relaxed waist is about 29 inches. The garment comes with a matching flannel bag with a drawstring closure. The bag features a large sewn-on label/patch which displays a drawing of its contents (boxers), the size of the garment (in this case, large), the word "FLANNELS" at the top, and the following description at the bottom: "CONTENTS: One 100 percent cotton flannel boxers", "NIGHTSHIRT SAME PLAID AS BAG".

Issue:

Is style 2139 properly classified as women's shorts or sleepwear?

Law and Analysis:

In HRL 957615 of May 24, 1995, Customs classified an identical garment as sleepwear similar to nightdresses and pajamas. In that ruling, the requester indicated the garment

would be sold in its intimate apparel department where the customer could purchase the boxer separately or put it together with the matching nightshirt in a bag to make a complete set of pajamas.

In that case, additional information was submitted indicating specifically how the garment would be displayed and sold in the intimate apparel department of the store. In addition, the garment had a sewn in label indicating it was a sleepwear garment. In *Mast*, 9 CIT 549, at 551, the court pointed out that the expert witnesses in that case agreed "that most consumers purchase and use a garment in the manner in which it is marketed." The sewn in label was a factor considered in determining how the garment was marketed and likely to be used by purchasers, though it was not determinative in and of itself.

Based upon the additional information regarding the specific marketing of the garment at the retail level and taking into consideration all of the information presented, Customs believed the garment was being held out to consumers as a sleepwear garment which was part of a sleepwear line including nightshirts in a bag and as such would principally be used as sleepwear.

The garment was identical to the garment in HRL 956506. The arguments put forth in both cases were similar, however in HRL 957615 the information provided included information from the retailer stating specifically the manner in which it would display and sell the good. This additional information led to a decision that the garment was properly classified as women's sleepwear.

Based upon the decision in HRL 957615 and in the interest of uniformity, Customs is modifying HRL 956506. The garment at issue therein, style 2139, is properly classified as a sleepwear garment similar to pajamas and nightdresses in subheading 6208.91.3010, HTSUSA, textile category 352, dutiable at 11.8 percent *ad valorem*.

Holding:

Style 2139, the women's boxer shorts and the matching flannel bag, are classified as composite goods. The goods are classified according to the classification for the boxer shorts. The women's cotton boxer shorts are classified as sleepwear garments similar to pajamas and nightdresses in subheading 6208.91.3010, HTSUSA, textile category 352, dutiable at 11.8 percent *ad valorem*.

In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF ACRYLIC CARPETS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of certain acrylic carpets. Notice of the proposed modification was published June 7, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 23.

EFFECTIVE DATE: This decision is effective for merchandise entered or withdrawn from warehouse for consumption on or after October 16, 1995.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Classification Branch, (202) 482–7058.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On June 7, 1995, Customs published in the CUSTOMS BULLETIN, Volume 29, Number 23, proposing to modify New Orleans ruling letter (NY) 802630, dated October 11, 1994, concerning the tariff classification of certain acrylic tufted carpets. No comments were received in response to the proposed modification.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying NY 802630 to reflect proper classification of the tufted acrylic carpets in subheading 5703.30.0010, HTSUSA, which provides for tufted carpets of other man-made textile materials. Headquarters Ruling Letter (HQ) 957573, modifying NY 802630, is set forth in the Attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1) Customs Regulations (19 CFR 1 177.10(c)(1)).

Dated: July 31, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 31, 1995.

CLA–2 R:C:T 957573 jb
Category: Classification
Tariff No. 5703.30.0010

TONY HEIDT
FRITZ COMPANIES, INC.
LIBERTY BUILDING
7001 Chatham Center Drive, Suite 100
Savannah, GA 31406

Re: Modification of NY 802630; incorrect classification determination.

DEAR MR. HEIDT:

On October 11, 1994, you were issued, on behalf of your client, Lowes Companies, Inc., NY 802630, regarding the classification of certain acrylic carpets. We have had occasion to review that ruling and have determined that it is in error.

Facts:

The carpets in question measure approximately 2 feet by 4 feet and are oval in shape. They are constructed by means of hand tufting, using yarn which is stated to be 100 percent acrylic fibers. The individual tufts are drawn from the face of the carpet through a woven backing and then through the face again for cutting by hand or by the use of a hand tool. The tufts are not knotted. A gum like substance has been applied to the back of the carpet to hold the tufts in place. This is then covered by another backing of woven fabric which appears to be impregnated, coated or covered with rubber or plastics.

We note that although NY 802630 was issued with a NY prefix it should have been issued as a District Decision (with a DD prefix). The carpets were classified under subheading 5703.20.1000, HTSUSA, as carpets of nylon or other polyamides.

Issue:

What is the proper classification for the carpets at issues

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification will be determined according to the terms of the headings and any relative section or chapter notes. Where goods cannot be classified solely on the basis of GRI 1, the remaining GRI will be applied, taken in order.

Subheading 5703.20, HTSUSA, provides for carpets and other textile floor coverings, of nylon or other polyamides. Although acrylic, nylon and other polyamides are man-made fibers, acrylic is not a nylon or other polyamides as defined in Chapter 54, Note 1 of the Tariff Schedule. The proper classification for the tufted carpets is in the appropriate provision in subheading 5703.30, HTSUSA, for carpets of other man-made textile materials.

Holding:

The subject carpets are correctly classified in subheading 5703.30.0010, HTSUSA, which provides for carpets and other textile floor coverings, tufted, whether or not made up of other man-made textile materials, measuring not more than 5.25 m^2 in area. The applicable rate of duty is 7.4 percent *ad valorem* and the quota category is 665.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that your client check, close to the time of shipment, *The Status on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, your client should contact the local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF MEN'S WOVEN SHIRTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of certain men's woven shirts. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before September 15, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue. N.W., (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., N.W., Suite 4000, Washington DC.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Classification Branch, (202) 482–7058.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of certain men's woven shirts.

In District ruling letter (DD) 897763, dated June 6, 1994, certain men's woven shirts were classified in heading 6211, HTSUSA, as men's

or boys' other garments. This ruling letter is set forth in "Attachment A". This office has reviewed the decision in DD 897763 and it is our opinion that the outcome in DD 897763 is in error.

At issue in this proposed revocation is whether the subject merchandise, i.e., the men's woven shirts are more specifically provided for in heading 6205, HTSUSA.

Customs intends to revoke DD 897763 to reflect proper classification of the men's woven shirts in heading 6205, HTSUSA, in the appropriate subheading for men's shirts of man-made fibers with two or more colors in the warp and/or the filling. Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters Ruling Letter (HQ) 957876 is set forth in "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: July 25, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Miami, FL, June 6, 1994.

CLA–2–62–DD:C:D I:I22 897763
Category: Classification
Tariff No. 6211.33.0040

MICHELLE CREBBIN
JANTZEN INC.
P.O. Box 3001
Portland, OR 97208–3001

Re: The tariff classification of a men's woven shirt from Guatemala.

DEAR MS. CREBBIN:

In your letter dated March 31, 1994, you requested a tariff classification ruling.

The submitted sample, style number IM322 is a men's shirt made of two types of fabric. The upper body and sleeves is 65 percent polyester and 35 percent woven cotton fabric. The lower body is 60 percent cotton and 40 percent polyester knit fabric.

The garment features a knit shirt collar, a three button placket neck opening, short sleeves and a rib knit waistband. Your sample will be returned as requested.

The applicable subheading for the jacket will be 6211.33.0040, Harmonized Tariff Schedule of the United States (HTS), which provides for other garments, men's or boys', of man-made fibers, shirts excluded from heading 6205. The rate of duty will be 17 percent *ad valorem*.

The shirt falls within textile category 640. Based upon international textile trade agreements, products of Guatemala are subject to the requirement of a visa and quota restraints.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the Status Report on Current Import Quotas (Restraint Levels), an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy, of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the entry documents are filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

D. LYNN GORDON
District Director,
Miami District.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 R:C:T 957876 jb
Category: Classification
Tariff No. 6205.30.2050

MICHELLE CREBBIN
JANTZEN INC.
P.O. Box 3001
Portland, OR 97208–3001

Re: Revocation of DD 897763; woven shirts with rib knit waistbands not excluded from heading 6205, HTSUSA; HQ 085802, HQ 088528; HQ 081616; HQ 082467.

DEAR MS. CREBBIN:

In District ruling (DD) 897763, dated June 6, 1994, Customs classified a men's woven shirt of man-made fibers in heading 6211, HTSUSA. After careful review of that ruling we have determined that it is in error.

Facts:

The subject merchandise consists of a men's woven shirt, referenced style number IM322, made up of two types of fabric. The upper body and sleeves are 65 percent polyester and 35 percent woven cotton. The lower body is composed of 60 percent cotton and 40 percent polyester knit fabric. The garment also features a knit shirt collar, a three button placket neck opening, short sleeves and a rib knit waistband.

In DD 897763, the subject garment was classified in heading 6211, HTSUSA, as a men's or boys' other garment, shirts excluded from heading 6205, HTSUSA. The garment was precluded from classification in heading 6205, HTSUSA, because it featured a rib knit waistband.

Issue:

Whether the garment is properly classifiable in heading 6205, HTSUSA, as a men's shirt or in heading 6211, HTSUSA, as an other garment?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the rules of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI.

Heading 6205, HTSUSA, provides for men's or boys' shirts. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN) for chapter 62, HTSUSA, state:

> Shirts and shirt-blouses are garments designed to cover the upper part of the body, having long or short sleeves and a full or partial opening starting at the neckline.

The EN to heading 6205, HTSUSA, further state:

> The heading **does not cover** garments having the character of wind-cheaters, wind-jackets, etc., of **heading 62.01,** which generally have a tightening at the bottom, or of jackets of **heading 62.03,** which generally have pockets below the waist. Sleeveless garments are also **excluded.**

The EN to heading 6205, HTSUSA, clearly exclude from its provisions only those garments which have the character of wind jackets of heading 6201, HTSUSA, and jackets of heading 6203, HTSUSA. Although the subject garment features a type of tightening at the waist, it neither exhibits the character of a wind jacket nor of a jacket of heading 6203, HTSUSA. Furthermore, Customs has held similar garments featuring tightening at the waist to be classifiable as shirts of heading 6205, HTSUSA. *See,* HQ 081616, dated September 27, 1988; HQ 082467, dated August 24, 1989, HQ 085802, dated November 21, 1989, and HQ 088528, dated May 28, 1991.

Accordingly, DD 897763 is revoked. The proper classification for the subject merchandise is as a men's shirt in heading 6205, HTSUSA.

Holding:

The subject men's shirt, referenced style number IM322, is properly classifiable in subheading 6205.30.2050, HTSUSA, which provides for men's or boys' shirts: of man-made fibers: other: other; other: with two or more colors in the warp and/or the filling: men's. The applicable rate of duty is 30.7 cents per kilogram plus 27.3 percent *ad valorem* and the textile category is 640.

The designated and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, we suggest you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)* an issuance of the Customs Service which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 95–131)

TIE/COMMUNICATIONS, INC., PLAINTIFF *v.* UNITED STATES, U.S. CUSTOMS SERVICE, DISTRICT DIRECTOR, U.S. CUSTOMS DISTRICT OFFICE, ST. ALBANS, VERMONT, DEFENDANT

Court No. 91–04–00300

(Dated July 24, 1995)

AMENDED JUDGMENT

MUSGRAVE, *Judge:* Defendant United States has requested the Court to amend its final judgment issued pursuant to Slip Op. 95–30 to "clarify" that judgment, apparently confused by the Court's use of the word "moot" in the earlier proceeding. Specifically, defendant would have the Court, by declaratory judgment, adjudicate its rights to pursue courses of action against third parties not party to the aforementioned case. The Court is not prepared to go so far, but, for purposes of clarification, will amend the original judgment to provide simply that the preliminary injunction of May 15, 1991 is *terminated.* The Court notes that defendant has already filed an action, in this Court, against the said third parties. The rights of the parties in that case will be determined in that case.

(Slip Op. 95–132)

CPC INTERNATIONAL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–02–00144

[Defendant's motion to dismiss for lack of jurisdiction denied; Plaintiff's consent motion for oral argument denied.]

(Dated July 24, 1995)

Neville, Peterson & Williams (John M. Peterson and *George W. Thompson,* Esqs.), for plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch; *Jeanne E. Davidson,* Assistant Director *(Rhonda K. Schnare,* Trial Attorney), Civil Division, U.S. Department of Justice, for defendant.

OPINION AND ORDER

BACKGROUND

NEWMAN, *Senior Judge:* CPC International Inc. ("CPC") seeks preimportation judicial review pursuant to the court's jurisdiction under 28 U.S.C. § 1581(h). At issue is Customs Headquarters Ruling Letter 557994 of October 25, 1994 ("HRL"), which ruled that CPC's retail containers of finished peanut butter manufactured in the United States in part from Canadian peanut slurry must be marked to disclose that Canada is the country of origin, *i.e.,* "Product of Canada." On February 8, 1995, slightly over three months after the ruling, CPC filed this lawsuit seeking a declaratory judgment that the HRL is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.

Defendant moves to dismiss in accordance with CIT Rule 12(b)(1), claiming the court lacks jurisdiction under § 1581(h) since plaintiff has failed to demonstrate it would be irreparably harmed if preimportation review were denied. Therefore, argues the government, prior to judicial review plaintiff must first exhaust its administrative remedy by following the normal protest channels of review under 19 U.S.C. § 1514(a).

Plaintiff counters that should the court determine that § 1581(h) does not grant the court jurisdiction, a declaratory judgment in preimportation review falls within the court's residual jurisdiction under 28 U.S.C. § 1581(i) since the protest remedy is inadequate.

For the following reasons, the court holds that it has jurisdiction under § 1581(h), and thus, defendant's motion to dismiss is denied.

DISCUSSION

The court's jurisdictional basis for preimportation judicial review of a ruling is 28 U.S.C. § 1581(h), reading:

> **(h)** The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, *marking,* restricted

> merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, *but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.* [Emphasis added.]

H.R. Rep. No. 1235, 96th Cong., 2d Sess. 47, *reprinted in* 1980 U.S. Code Cong. & Adm. News 3729, 3758, explains the legislative intent in permitting preimportation judicial review:

> [i]t is not the Committee's intent to permit judicial review prior to the completion of the import transaction in such a manner as to negate the traditional method of obtaining judicial review of import transactions. Such review, however, is exceptional and is authorized only when the requirements of subsection (h) are met.

Hence, it is clear that Congress manifested a preference for post-importation judicial review of Customs' rulings following the traditional channels of administrative protest (19 U.S.C. §§ 1514 and 1515),[1] and its intent that preimportation judicial review should be available only in exceptional cases and where the importer can demonstrate it would be irreparably harmed unless given an opportunity to obtain judicial review prior to importation. On the latter issue, as with jurisdiction generally, the plaintiff bears the burden of proof. *American Frozen Food Products Inst., Inc. v. United States,* 855 F. Supp. 388, 393 (1994); *National Juice Prods, Ass'n v. United States,* 628 F. Supp. 978, 982 (1986).

It is well established that "irreparable harm" within the purview of § 1581(h) is harm that cannot be redressed in a court of law. Essential to the inquiry into irreparable harm is the immediacy of the injury and inadequacy of future corrective relief. *American Frozen Food Products Inst., Inc.* and *National Juice Products Ass'n.* Where an importer demonstrates that compliance with a ruling of Customs regarding country of origin marking would cause the importer to incur costs, expenditures, business disruption or other financial losses, for which the importer has no legal redress to recover in court, even if the importer ultimately prevails on the merits in contesting the ruling, the importer suffers irreparable harm within the purview of § 1581(h). *National Juice; American Frozen Food Products Inst., Inc.;* 718 *Fifth Avenue Corp. v. United States,* 7 CIT 195 (1984); *Lois Jeans & Jackets, U.S.A., Inc. v. United States,* 566 F. Supp. 1523 (1983).

Specifically, in the context of a ruling of Customs concerning country of origin marking, irreparable harm may take, among others, the following forms: an importer's inability to immediately acquire new labels or packaging that comply with a ruling effective immediately; due to unavailability of labels or packaging complying with the ruling, the importer's inability to timely ship customer orders with consequential damage to customer confidence and relationships; expenses of redesign-

[1] The traditional protest route—the filing and denial of a protest—forms the predicate for the exercise of this court's jurisdiction pursuant to 28 U.S.C. § 1581(a).

ing new labels or packaging complying with the ruling; expenses of affixing new labels; loss and expense incident to storage or destruction of noncomplying labels and packaging in inventory; costs and expenditures for reengineering production methods or inventory control and tracking systems. *See e.g. National Juice; American Frozen Food Products Inst., Inc.;* 718 *Fifth Avenue Corp.; Lois Jeans.*

Plaintiff may, but need not, demonstrate that it would suffer multiple forms of irreparable harm. Moreover, "[w]hat is critical is not the magnitude of the injury, but rather its immediacy and the inadequacy of future corrective relief." *National Juice,* 628 F. Supp. at 984. However, in determining whether § 1581(h) jurisdiction should be invoked, the availability of viable inexpensive interim means for compliance with the ruling that would "reduce the impact of the change in labeling and substantially mitigate the damage" may be considered by the court. *National Juice,* 628 F. Supp. at 985–87, citing *Association of Food Industries, Inc. (Pistachio Group) v. von Raab,* 624 F. Supp. 1557 (1985) ("interim stickering" found not viable; "[i]n any case, even if adhesive stickers were physically possible to apply, plaintiffs could not recoup the significant costs of acquiring the equipment and stickers"). *See also Inner Secrets/Secretly Yours, Inc. v. United States,* 1995 WL 72429 (CIT, Feb. 1995) (failure to attempt mitigation detracts from importer's argument that it may be irreparably harmed).

Plaintiff strenuously maintains that if preimportation judicial review of the HRL were not granted, plaintiff would incur certain costs, expenses and losses, identified *infra,* that could not be recouped even if plaintiff were ultimately successful in contesting the ruling, and consequently plaintiff would suffer irreparable harm within the purview of the statute.

Defendant, on the other hand, vigorously disputes that the costs and expenses claimed by CPC constitute forms of harm contemplated by the statute, and contends that in any event, CPC has failed to even adequately document the harm claimed.

As documentation of the harm claimed by CPC resulting from the HRL, CPC has proffered an affidavit and a supplemental affidavit of Jerry Brennan, Business Director of the Best Foods Division of CPC, Englewood Cliffs, New Jersey. Brennan's duties cover food product packaging, labeling, and related oversight of technical regulatory compliance, including CPC's peanut butter produced in the United States in part of Canadian peanut slurry and sold at retail under the "Skippy" brand label.

The affidavits disclose:

1. CPC manufactures approximately 156,000,000 jars of peanut butter annually, of which approximately 140,000,000 are sold in the United States market. CPC sells several peanut butter products in a number of different sized retail packaging.

2. Since December 1992, CPC has periodically imported into the United States substantial quantities of Canadian-origin peanut slurry

for use in the production of finished peanut butter products in the United States. To promote product uniformity, CPC blends Canadian peanut slurry with similar peanut slurry manufactured in the United States.

3. CPC imported and used 3.4 million pounds of Canadian peanut slurry for manufacturing peanut butter during 1994, projects importation of 3.1 million pounds of Canadian slurry for manufacturing peanut butter during 1995, and has secured a quota allocation for that amount. Based on CPC's historical maximum blend ratio of 18.4 percent Canadian slurry to 81.6 percent domestic slurry, this quantity of slurry would produce approximately 16.8 million pounds of finished Skippy peanut butter—enough to fill more than 44,000,000 6-ounce jars, or more than 22,000,000 12-ounce jars each year.

4. CPC achieves a substantial financial benefit from importing and using Canadian-origin slurry because it has a lower cost than domestic slurry. Canadian slurry is less expensive than domestic slurry because the imported slurry is made from peanuts costing about $0.30 per pound less than the peanuts used in the domestic slurry. Without importing very substantial quantities of Canadian origin slurry, CPC would lose this significant cost savings resulting in lower profits. Such higher cost and loss of profit from using solely domestic peanut slurry could not be recouped from the government in the event that plaintiff were successful in contesting the validity of the HRL.

5. CPC has designed, printed, and placed in inventory some twenty different labels covering its peanut butter products manufactured at several different geographical locations in the United States. Each label identifies and depicts the product and is printed with information showing the ingredients used in its manufacture, the company's name and address, a purchase date, net contents information, a UPC bar code and nutrition information required by the Nutrition Labeling and Education Act of 1990. CPC's current labels do not denote any foreign country of origin. The HRL requires CPC to print new labels bearing the words "Product of Canada."

6. To begin with, CPC would be required to make artwork and design changes for twenty different labels costing approximately $800.00 per label design change, resulting in a total cost of $16,000.00 for artwork and design changes.

7. CPC would incur significant printing costs for new labels. Printing of new labels incident to compliance with ruling would cost between $2.16 to $7.89 per 1000 labels, with an average cost of approximately $6.00 per 1000 labels for a portion of plaintiff's 144 million jars of peanut butter sold domestically each year. CPC would be especially impacted by again incurring redesign and printing costs for new labels as a result of the HRL inasmuch as CPC recently incurred such costs in order to comply with the government's labeling requirements imposed by the Nutrition Labeling and Education Act of 1990.

8. Compliance with the ruling would additionally cause plaintiff to incur costs for production changes and special new inventory management methods, which in turn would increase CPC's working capital costs for label inventory and would double the number of stock keeping units of labeling inventory.

9. CPC would further incur substantial costs, which cannot now be quantified with accuracy, for inventory management in accordance with the methods specified in the Customs Regulations[2] or other methods. The "specific identification" inventory method, available under the Customs Regulations, would entail hundreds of thousands of dollars of added manufacturing costs annually and would diminish the company's productive capacity. Other prescribed inventory management methods, FIFO, LIFO, or averaging, would require CPC to design and implement new recordkeeping systems to comport with the applicable requirements and would result in added costs to CPC, that like all other costs and expenses incident to a newly instituted country of origin marking, would not be recouped by a favorable decision on the merits in preimportation judicial review.

10. Compliance with a new country of origin labeling requirement would cause an immediate disruption of plaintiff's sales. The HRL of October 25, 1994 was effective immediately. On that date, CPC had no labels on hand complying with the ruling and the lead time for obtaining new labels is approximately eight to ten weeks from the date the order for labels is placed. More, CPC would need time to modify its production system, as indicated above. Until new labels are obtained and production modified, CPC would be prevented from shipping peanut butter thereby suffering substantial lost sales, loss of customer confidence and lost profits.

11. The foregoing financial costs and losses incurred by CPC, including lost sales and production, cannot be recouped by CPC at a later time by increasing production and supply above customer need and demand, which are immediate and short term. Furthermore, even if CPC were ultimately to prevail in its contest of the validity of the HRL, the United States would have no legal obligation to compensate CPC for any monetary losses or additional costs or expenses CPC would incur in complying with the HRL.

12. There are no viable measures on even an interim basis for country of origin stickering that would not entail substantial costs for CPC. Whether CPC employed an automated adhesive method or manual application of second labels on an interim basis, thousands of man hours of labor for tens of millions of jars of peanut butter would cause CPC to incur very substantial unrecoupable costs.

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[2] 19 C.F.R. § 102.11(b)(2) provides: "If the material that imparts the essential character of the good is fungible, has been commingled, and direct physical identification of the origin of the commingled material is not practical, the country or countries of origin may be determined on the basis of the inventory management method provided under the Appendix to part 181 of the Customs Regulations." The inventory methods described in this appendix are the specific identification method, the FIFO (first in, first out) method, LIFO (last in, last out), and the average method. Prior to the HRL, CPC incurred no cost or expense for inventory management incident to country of origin. Significantly, defendant does not suggest any expense-free option that would be available to CPC.

Many of the costs and expenses above described in the Brennan affidavits appear to be very similar in form to those found by the court to constitute irreparable harm for purposes of preimportation judicial review under § 1581(h) in *National Juice* and *American Frozen Food Products Inst., Inc.*

Defendant, however, insists that those cases are distinguishable on their specific facts from the current case. For example, the court found interim stickering not feasible because adhesive labels would not adhere to the wet surface frozen food containers, which defendant maintains is not the case with jars of peanut butter for which interim stickering is feasible. Moreover, in *National Juice Products* the court found that plaintiffs could not forego importing foreign orange juice while conducting a test case because severe freezes had substantially diminished the availability of U.S. oranges, and product consistency could not be ensured without inclusion of foreign juice. 628 F. Supp. at 986. Here, according to defendant, CPC could import only a test shipment for purposes of filing a protest and use domestic supplies of peanut slurry. Finally, defendant claims that the two cases are distinguishable since in those cases plaintiffs would have incurred costs of redesign of its packages in conformance with Customs' ruling. *National Juice Products,* 628 F. Supp. at 978; *American Frozen Food Institute,* 855 F. Supp. at 394.

The court finds that defendant strains to distinguish *National Juice Products* and *American Frozen Foods Institute* from the current case based on irrelevant factual distinctions while ignoring the court's rationale for finding irreparable harm in the context of country of origin marking and disregarding the undisputed facts of the current case. The types of harm demonstrated by the Brennan affidavits—significant costs, expenditures and losses that would be incurred in complying with the marking ruling—are virtually the identical forms of harm addressed in *American Frozen Food Institute* and *National Juice.*

Moreover, CPC has adequately demonstrated that it would incur irreparable harm even if it were to use interim adhesive stickers or rely solely on domestic supplies of peanut slurry during an administrative review of a protest. The Brennan affidavits demonstrate that if plaintiff were not to import substantial quantities of the Canadian slurry, during the period of non-importation, plaintiff would be required to incur the higher cost of the domestic slurry and loss of profit. Consequently, importing merely a test shipment of Canadian slurry simply to file a protest against its exclusion from entry,[3] as advocated by defendant, would not obviate the negative financial impact of relying on the higher cost domestic supplies.

Further, defendant's insistence that CPC should be compelled to import a test shipment to precipitate a protestable seizure or exclusion of its merchandise for noncompliance with the ruling in order to obtain

[3] Defendant notes that "as a result of the letter ruling, CPC will be required to certify at the time of filing the entry summary that the final product will be marked 'Product of Canada'." *See* 19 C.F.R. 134.26. The refusal of CPC to so certify will result in Customs excluding the merchandise [the slurry imported in bulk], which, as conceded by CPC, is protestable pursuant to 19 U.S.C. § 1514(a)(4)." Rely Brief at 12–13.

judicial review seems inconsistent with *Ross Cosmetics Distribution Centers, Inc. v. United States,* 17 CIT 814 (1993). In *Ross,* the court assumed jurisdiction under § 1581(h), without opposition by the government, to review a ruling by Customs determining that plaintiff's proposed labels and packages for imported cosmetic products constituted a counterfeit use of trademarks, and if the products were imported they would be subject to seizure. Hence, *Ross* was not required to follow the normal channels of importing and protest to contest Customs' trademark ruling where the goods would have been seized upon importation and excluded from entry. Indeed, as pointed out in *National Juice,* 628 F. Supp. at 984, noncompliance with the country of origin marking statute, 19 U.S.C. § 1304(g), could result in withholding of delivery until proper marking of the goods or until proper certifications are filed, with consequential severe business disruption. *See also Trayco, Inc. v. United States,* 994 F. 2d 832 (Fed. Cir. 1993).

With regard to defendant's claim that CPC failed to show that it could not mitigate its irreparable harm by use of interim adhesive stickers, CPC has convincingly demonstrated that even interim adhesive stickers would cause CPC to incur substantial costs of design, printing and high volume automated or manual application, as well as inventory tracking.

Insisting that the Brennan affidavits do not demonstrate the "type of harm" that is "sufficient" to confer jurisdiction on the court under § 1581(h), defendant calls attention to *Thyssen Steel Co. v. United States,* 712 F. Supp. 202 (CIT 1989); 718 *Fifth Avenue Corp. v. United States,* 7 CIT 195 (1984); *Arbor Foods, Inc v. United States,* 600 F. Supp. 217 (CIT 1984); and *Manufacture de Machines v. Von Raab,* 569 F. Supp. 877 (CIT 1983). The foregoing cases held that plaintiffs did not demonstrate irreparable harm, but each case presents particular circumstances and types of harm readily distinguishable from those demonstrated by CPC.

In *Thyssen Steel,* the court found that the consequences of simply a reclassification of merchandise subjecting the importer's merchandise to voluntary restraint arrangements—possible exclusion from entry (with consequential lost profits, lost good will and tarnished good name)—is not the type of harm contemplated by § 1581(h).

Manufacture de Machines, 569 F. Supp. at 881, holds that irreparable harm may not be predicated on the consequences of possible exclusion of merchandise from entry based on trademark infringement—lost profits, lost opportunities to make agreements for sale of its product, lost good will and tarnished good name.

In *718 Fifth Avenue,* the importer received an unfavorable ruling from Customs that plaintiff would not be entitled to drawback of duty by reimporting and then timely exporting certain merchandise simply for the purpose of making a drawback claim. Plaintiff then filed suit under § 1581(h) seeking a preimportation declaratory judgment that Customs' drawback ruling was erroneous. In rejecting plaintiff's claim of irreparable harm and thus jurisdiction under § 1581(h), the court held

that plaintiff had an adequate remedy for contesting the ruling by protest after importation upon denial of an application for drawback. Citing *United States v. Uniroyal, Inc.*, 69 CCPA 179, 687 F.2d 467 (1982), the *718 Fifth Avenue* court aptly observed: "The importer would only have to allege that the Customs Service had ruled against it and the unfavorable ruling would make it unlikely that the importer could obtain the desired result *[viz.*, a drawback] when the import transaction was attempted." Accordingly, *718 Fifth Avenue* precludes a finding of irreparable harm based simply on the fact that Customs has ruled against the importer's position and may adhere to its ruling after importation. Again, that is not the situation here.

Arbor Foods, Inc. rules that the court will not find irreparable harm for purposes of preliminary injunction from lost sales and profits, lost benefits from past marketing efforts, damage to reputation, which the court determines to be highly speculative.

Hence, the types of harm involved in the above-cited cases relied on by defendant—*none of which involved potential costs and expenses for compliance with a ruling requiring country of origin marking*—are totally inapposite to the circumstances here.

Citing *Thyssen, 718 Fifth Avenue, Inner Secrets/Secretly Yours, Inc. v. United States*, 1995 W.L. 72429 (CIT Feb. 14, 1995), and *Ass'n of Food Indus., Inc. v. Von Raab*, 624 F. Supp. 1557 (1985), defendant also argues that even assuming *arguendo* that the Brennan affidavits described the type of harm encompassed by § 1581(h), CPC has nonetheless failed to "document" numerically the extent of the harm that would be incurred by plaintiff, and in any event, plaintiff failed to demonstrate that the ruling posed a sufficient threat to CPC's ability to continue operating as a profitable business.

Defendant's contention that CPC failed to adequately document irreparable harm is squarely refuted by *National Juice and American Frozen Food Institute, supra.* Significantly, in both cases the court accepted as adequate proof of irreparable harm estimates and projected possible costs and losses that would be incident to meeting Customs' country of origin marking requirements. As previously noted, the magnitude of the harm, while relevant to whether preimportation review may be justified, is not critical. *See National Juice,* 628 F. Supp. at 984.

In *American Frozen Food Institute,* the court found acceptable as proof of irreparable harm affidavit evidence that "[p]laintiffs * * * *will* lose substantial sums of money from the destruction of stockpiled noncomplying labeling"; that "costs for labelling redesign * * * were *projected* at *over* $9 million"; that "costs to destroy labels and its printing costs to change labels *would be in excess of* $900,000"; that *"estimated costs* additionally reflect that in many instances * * * plaintiff *would be* required to design and order multiple packages for one product"; and that "it *would be* necessary to reengineer its inventory management process." *Id.* at 393–94 (emphasis added).

In *National Juice,* the court received: *affidavit evidence* of packaging suppliers that they *will be* unable to timely provide the necessary labels and cans, and *estimating* that the transition to packaging complying with the new ruling would consume a year to two and one-half years; evidence that inability to immediately comply with the new ruling would result in the inability to fill orders placed by retail customers; documentation of the *possibility* of *significant* disruption of plaintiffs' business operations that would result if plaintiffs were required to comply with the ruling

See also Lois Jeans & Jackets, U.S.A., Inc. v. United States, 566 F. Supp. 1523, 1527 (1983) wherein this court accepted as adequate proof of irreparable harm to enjoin redelivery notices issued under ruling unrebutted affidavit evidence and oral testimony establishing *inter alia,* prospect for loss of future sales and orders, injury to plaintiff's reputation as a reliable supplier, potential costs *(which could not be precisely quantified)* required to alter plaintiff's production methods, and other actual and potential injuries.

In sum, the undisputed Brennan affidavits adequately document the forms of harm claimed by CPC and demonstrate irreparable harm within the purview of the statute.

Finally, in opposing preimportion judicial review, defendant cites *718 Fifth Avenue,* arguing that CPC's approximately three month delay after the HRL to commence this lawsuit undercuts its claim of irreparable harm. Under the circumstances of this case, the court finds the government's delay argument misplaced.

Unquestionably, delay by an importer in seeking preimportation judicial review is a relevant factor in determining whether denial of such review would result in irreparable harm to the importer. Obviously, an importer's claim that it would be irreparably harmed by being required to utilize the normal protest channel or review as a prerequisite to judicial review is undercut by unreasonable delay in commencing a lawsuit seeking judicial review under § 1581(h).

In *718 Fifth Avenue,* preimportation review under § 1581(h) was denied by the court for failure to demonstrate irreparable harm, citing among other reasons that the importer had delayed filing suit for approximately nine months after the issuance of an adverse drawback ruling by Customs.

The court does not regard *718 Fifth Avenue* controlling here. CPC's little more than three months delay before filing suit was hardly an unreasonable time for plaintiff to make a responsible investigation and assessment of the projected costs and expenses that would be incident to compliance with the country of origin ruling, obtain advice of counsel, and weigh its options.

CONCLUSION

In view of the foregoing, the court need not reach plaintiff's alternative basis for jurisdiction under § 1581(i). CPC has appropriately invoked this court's jurisdiction over preimportation declaratory judg-

ments in compliance with § 1581(h). Defendant's motion to dismiss is denied.

Finally, the court finds that the parties' exhaustive briefing and analysis of the relevant legal issues and precedents adequately present their positions, and in view of the decision reached herein and in the interest of judicial economy, plaintiff's consent motion for oral argument is denied.

NOTE: Pursuant to the court's Procedures for Publication of Opinions and Orders, the court's unpublished order entered on July 26, 1995 is being published by the Clerk's Office as Slip Op. 95–133 on July 26, 1995.

(Slip Op. 95–133)

FAG KUGELFISCHER GEORG SCHÄFER AG AND FAG BEARINGS CORP., ET AL., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR

Court No. 95–03–00335

(Dated July 24, 1995)

ORDER

TSOUCALAS, *Judge:* Upon consideration of the Second Consent Motion of Plaintiff's FAG Kugelfischer Georg Schäfer AG and FAG Bearings Corporation for an expedited remand to correct ministerial errors and the entire record herein, it is hereby

ORDERED that plaintiff's motion is granted; and it is further

ORDERED that the Department of Commerce, International Trade Administration ("ITA") is directed to correct, for FAG Germany, the ministerial errors enumerated below contained in the amended *Final Results* of the fourth administrative review of antifriction bearings (other than tapered roller bearings) and parts thereof, published as *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Germany and Italy; Amended Final Results of Antidumping Duty Administrative Reviews,* 60 FR 31142 (June 13, 1995):

1. For FAG Germany, (i) reinstate 1992 sales made to those customers to whom rebates were granted in 1992 *and* (ii) remove 1993 sales made to the one U.S. customer for whom corporate rebates were reported (prior to applying the BIA rate to 1993 sales) but reinstate these 1993 sales in the total US sales database by employing the following SAS instructions:

```
123  DATA USSALES REBBIA;
124    MERGE POSREB (IN=INA) USSALES (IN=INB);
125    BY CUSTCDE;
```

```
126     IF INA AND INB THEN DO;
127       IF YEAR = 1993 THEN DO;
128         IF CUSTCDE NOT IN
                    ('010254'  '010277'  '010415'  '011098'  '011134'
                    '011197'  '014318'  '014490'  '014542'  '014587'
                    '014631'  '014641'  '014642'  '034321'  '040021'
                    '040061'  '040355'  '040396'  '040458'  '040670'
                    '040673'  '040867'  '040886'  '040937'  '041015'
                    '041100'  '041851'  '042040'  '042157'  '042213'
                    '043022'  '043085'  '043160'  '043162'  '043183'
                    '043190'  '043779'  '043785'  '043792'  '044222'
                    '044444' '070083'
171                 '070183' '070184' '110038' '119805' '149801')
172                 THEN REBATEE = REBATEE + ((UNITPRE+
                    OTHREVE)* 0.085;
173           OUTPUT REBBIA;
174         END;
175       END;
176     IF INB THEN OUTPUT USSALES;
177     RUN
```

2. With respect to FAG Germany, subtract other discounts (OTHDISE) from the reported unit price (UNITPRE) prior to applying the BIA rate to UNITPRE. Amend line 172 as follows:

```
172     REBATEE = REBATEE+((UNITPRE + OTHEREVE-
        OTHDISE)* 0.085);
```

ORDERED that ITA shall publish a second amended *Final Results* incorporating these corrections in the Federal Register within sixty (60) days of the entry of this order; and it is further

ORDERED that all parties to this action are granted leave to file amended complaints to take into account any changes in the final results resulting from the ITA's actions pursuant to this Order, within thirty (30) days of the publication of the amended final results.

(Slip Op. 95–134)

NACCO MATERIALS HANDLING GROUP, INC., INDEPENDENT LIFT TRUCK BUILDERS UNION, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA (AFL-CIO), & UNITED SHOP AND SERVICE EMPLOYEES, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TOYOTA MOTOR SALES, U.S.A., INC., DEFENDANT-INTERVENOR

Court No. 94–02–00096

Plaintiffs move for judgment upon the agency record to contest certain aspects of Commerce's June 1, 1989, through May 31, 1990, administrative review of an antidumping duty order on certain internal-combustion, industrial forklift trucks from Japan. *See Certain Internal-Combustion Industrial Forklift Trucks From Japan*, 59 Fed. Reg. 1374 (Dep't Comm. 1994) (final results). Plaintiffs request the Court remand the action to Commerce for a redetermination.

Held: The Court remands with the following instructions: (1)(a) Commerce shall consider plaintiffs' argument that Toyota's credit revenue offset for interest income earned on financing arrangements made with unrelated dealers was improper because the financing and sale of the forklift trucks were separate transactions; (b) if on remand Commerce determines that the corporate relationship of TMS, TMCC, and Toyota is a determinative factor in its consideration of plaintiffs' argument against Toyota's credit revenue offset, Commerce is instructed to explain its finding as to that relationship and to point out what evidence on the record, if any, supports its finding; (c) Commerce is instructed to provide an explanation of how it adjusts for credit revenue, and to state the statutory, regulatory, or other authority for making such adjustments; and (2) Commerce shall make determinations with respect to the issue of whether the expenses of retrofitting forklift trucks with occupant restraint safety seats should have been deducted from United States price in accordance with the instructions in the order accompanying this opinion.

(Dated July 26, 1995)

Collier, Shannon, Rill & Scott (Paul C. Rosenthal, Mary T. Staley, and *David C. Smith, Jr.),* for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Civil Division, Commercial Litigation Branch, United States Department of Justice *(Michael S. Kane), Priya Alagiri,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for defendant.

Dorsey & Whitney (John B. Rehm, Munford Page Hall, II, and *L. Daniel Mullaney),* for defendant-intervenor Toyota Motor Sales, U.S.A., Inc.

OPINION

CARMAN, *Judge:* Plaintiffs NACCO Materials Handling Group, Incorporated, Independent Lift Truck Builders Union, International Association of Machinists and Aerospace Workers, International Union, Allied Industrial Workers of America (AFL-CIO), and United Shop and Service Employees (collectively "plaintiffs") have moved for judgment upon the agency record to contest certain aspects of the United States Department of Commerce's ("Commerce" or "Department") *Certain Internal-Combustion Industrial Forklift Trucks From Japan*, 59 Fed. Reg. 1374 (Dep't Comm. 1994) (final results) *(Final Results).* Plaintiffs request the Court remand the action to Commerce for a redetermination. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (1988).

BACKGROUND

On January 10, 1994, Commerce published the final results of its June 1, 1989, through May 31, 1990, administrative review of the antidumping duty order on certain internal-combustion, industrial forklift trucks[1] from Japan. *See Final Results*, 59 Fed. Reg. at 1374. This review covered sales made by Toyota Motor Corporation (Toyota).[2] *Id.* at 1375.

During the period of review, Toyota's U.S. selling division, defendant-intervenor Toyota Motor Sales, U.S.A., Incorporated (TMS), sold Toyota's forklift trucks in the United States to dealers. *Id.* at 1379. The dealers sold the forklift trucks to end-users. *Id.* A related finance company, Toyota Motor Credit Corporation (TMCC), served as a source of financing to both dealers and end-users for their forklift truck purchases. *Id.* In its antidumping calculations for Toyota in the administrative determination under review, Commerce based U.S. price on the price to the first unrelated purchaser in the United States. *Id.* Thus, Commerce based Toyota's U.S. sales price on the price Toyota's U.S. selling division, TMS, charged unrelated dealers. *Id.*[3]

Toyota claimed credit revenue for its U.S. sales. *Id.*[4] This credit revenue consisted of revenue TMCC received from both unrelated dealers[5] and unrelated end-users[6] as a result of financing TMCC supplied. Id.[7] Commerce allowed the inclusion of revenue received from unrelated dealers, but disallowed revenue received from unrelated end-users. *Id.* Commerce explained that because it had based U.S. price on the price TMS charged to unrelated dealers, Commerce considered "revenue gen-

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[1] For a further description of the products under review, see *Final Results*, 59 Fed. Reg. at 1374–75.

[2] Commerce also reviewed sales made by Toyo Umpanki Company, Ltd. (Toyo) for the same period. *Final Results*, 59 Fed. Reg. at 1375. Issues relating to Commerce's review of Toyo were originally challenged in this proceeding. On September 7, 1994, however, a consent motion was entered remanding the *Final Results* to Commerce with an order to correct two clerical errors in the dumping calculations for Toyo. *See NACCO Materials Handling Group, Inc. v. United States*, No. 94–02–00096 (CIT entered Sept. 7, 1994, signed Sept. 6, 1994) (order remanding to Commerce). On remand, Commerce recalculated the weighted-average dumping margin for Toyo and changed that margin from 4.48% to 13.78%. *See* Final Results of Redetermination Pursuant to Court Remand, *NACCO Materials Handling Group, Inc. v. United States*, No. 94–02–00096 (Oct. 7, 1994). On November 18, 1994, this Court granted plaintiffs' consent motion to affirm the results of the redetermination and dismiss the remaining issues related to Toyo in this case. *See NACCO Materials Handling Group, Inc. v. United States*, No. 94–02–00096 (CIT Nov. 18, 1994) (affirming remand and dismissing Toyo issues). The Court's November 18, 1994, order further directed Commerce to direct the Customs Service to liquidate all of Toyo's entries at a final dumping rate of 13.78%. *Id.* at 2.

[3] In the *Final Results*, Commerce explains Toyota's U.S. price "was based on the price TMS/TIE charged its unrelated dealers." *Final Results*, 59 Fed. Reg. at 1379. TIE is the Toyota Industrial Equipment Division of TMS. *Id.* at 1378.

[4] At oral argument before this Court, Commerce explained the mechanics of this adjustment as follows. To account for differences between circumstances of sales in the United States and foreign markets, Commerce adjusts foreign market value pursuant to 19 U.S.C. § 1677b(a)(4)(B) (1988). One potentially adjustable circumstance is credit expense. As counsel for defendant explained to this Court:

> [Y]ou're trying to find credit expenses that exist on one side that don't exist on the other side, and in order to do that * * * Commerce determines that the seller of merchandise on the United States side incurs an expense due to the fact that payment exists solely in the form of an account receivable until payment is made upon the arrival of the goods after the merchandise is shipped. So during the lag period between the shipment of the merchandise and payment for the merchandise, under Commerce's economic theory the seller is incurring a credit expense.

(Tr. at 39–40.) A credit revenue or interest income offset is an offset to credit expense.

[5] Toyota referred to this as "wholesale" financing. *(See* Def.-Intervenors' Resp. at 2.)

[6] Toyota referred to this as "retail" financing. *(See* Def.-Intervenors' Resp. at 3.)

[7] Defendant-intervenor explains the claimed credit revenue to this Court as follows:

> [I]f the amount due from a customer was $10,000 for immediate payment and $10,200 for payment in 90 days, and the customer paid in 90 days, Toyota reported a U.S. price of $10,200. In such a case, $200 of the $10,200 is credit revenue, i.e., that part of the price which is due to the 90-day delay in payment. The Department deducts credit expense for the 90 days that payment is outstanding, calculating such expense using the daily short-term interest rate applied to the 90 days that payment is outstanding.

(Def.-Intervenors' Resp. at 2 n.1.)

erated as a result of the sale by the dealer to the end-user through a financing arrangement a separate transaction, and as such, not directly associated with the sales under review." *Id.*

During the administrative review at issue, plaintiffs also urged Commerce to consider costs allegedly incurred by Toyota in retrofitting its forklifts with redesigned seats under an operator restraint safety seat program (ORS program) as direct U.S. selling expenses. *Id.* at 1378. Toyota argued that any costs incurred due to the retrofit were only for forklifts imported and sold prior to the period of review. *Id.* In the *Final Results,* Commerce concluded "there [was] no evidence on the record indicating that forklifts sold during the [period of review] required retrofitting." *Id.* Furthermore, Commerce explained, "[p]etitioners have * * * provided no evidence that Toyota incurred any such expenses with respect to the Toyota sales made in the current [period of review]." *Id.* Accordingly, Commerce made no adjustment in the *Final Results* for Toyota's alleged retrofitting expenses. *Id.*

CONTENTIONS OF THE PARTIES

A. *Plaintiffs:*

Plaintiffs' first contention is that Commerce unlawfully allowed Toyota to offset its U.S. credit expense by the amount of interest income earned by TMCC on TMCC's loans to Toyota's unrelated dealers. Plaintiffs argue that a "circumstance-of-sale adjustment for credit expense must be related to the lost opportunity cost experienced by a seller to sell the product under review." (Pls.' Mem. in Support of Mot. for J. Upon Agency R. (Pls.' Br.) at 8.) Accordingly, plaintiffs maintain, in the present case "TMS's credit expense should have been calculated based on the time between the date the forklift was shipped to the dealer and the date TMS received payment for the truck." *(Id.* at 9.) Plaintiffs assert that TMS received payment from the dealers for the purchase of the trucks once the dealers obtained financing from TMCC. Upon receipt of this payment, plaintiffs argue, "the sales transaction was complete and TMS was no longer incurring any imputed credit expense." *(Id.)*

In contrast to the sales transaction, plaintiffs complain, the loan transaction between TMCC and the dealers was a separate transaction involving a distinct entity. According to plaintiffs, TMCC lent money to dealers once the sales negotiations were complete, and these financing arrangements did not affect the separately negotiated sales prices. Thus, plaintiffs assert, the interest income earned by TMCC was not credit revenue earned by TMS but instead was for the loan of money by TMCC. Plaintiffs maintain that Commerce, however, "unlawfully merged" the sales and lending transactions in calculating TMS's U.S. credit expenses. *(Id.)*

Plaintiffs further emphasize their position concerning the separate natures of the sale and lending transactions by discussing the different functions undertaken by TMS and TMCC. TMS, plaintiffs argue, sells forklift trucks to dealers, and thus TMS's imputed credit expense relates to the truck sales. Plaintiffs assert that TMCC, however, makes

loans which are financial arrangements unrelated to the sales. No evidence in the record, plaintiffs argue, suggests the unrelated dealers were obligated to borrow from TMCC or that the sales were dependent on obtaining a TMCC loan.

Contrary to Commerce's and TMS's arguments, plaintiffs maintain they did raise the issue of the deduction of interest income TMCC received from dealers in the administrative proceedings below. Plaintiffs claim to have made two arguments before Commerce relating to Toyota's claimed credit revenue. First, plaintiffs contested the offset for interest income received by TMCC from end-users. Second, plaintiffs made a broad argument that the sales and financing transactions were distinct. This second argument, plaintiffs contend, was not limited to transactions involving end-users. Furthermore, plaintiffs assert, at Commerce's hearing on this administrative review, plaintiffs' economic consultant "specifically discussed the separate nature of the transaction, not at the end-user level, but at the *dealer* level." (Pls.' Reply to Def.'s Resp. in Partial Opp'n and Def.-Intervenor's Resp. to Pls.' Mot. for J. Upon Agency R. (Pls.' Reply) at 5.) Moreover, "when viewed conceptually," plaintiffs maintain, the two arguments are clearly separate. *(Id.)* Plaintiffs contend Commerce's failure to address plaintiffs' argument specifically in relation to unrelated dealers should not preclude plaintiffs from making that argument before this Court. Furthermore, even if plaintiffs did not argue against a credit revenue offset for interest income received from dealers, plaintiffs claim that this Court may properly hear plaintiffs' argument because of an exception to the exhaustion doctrine which allows parties to raise a legal issue before the court even if not presented to the agency in the administrative review. Accordingly, plaintiffs ask this Court to remand the *Final Results* to Commerce with instructions to correct Commerce's decision to allow the offset for interest income earned by TMCC on loans to unrelated dealers.

Plaintiffs' second contention is that Commerce erred in refusing to make an adjustment for Toyota's ORS program expense as a warranty expense incurred during the period of review. Plaintiffs argue Commerce regularly adjusts dumping calculations for selling expenses incurred during the period of review but related to sales made prior to the period of review. If Commerce did not make such adjustments, plaintiffs maintain, Commerce would never account for certain expenses in its dumping calculations. (Pls.' Br. at 6 (citation omitted).)

Here, plaintiffs contend, the expenses incurred during the period of review due to the retrofitting were "a kind of warranty expense; that is, the expense was incurred to replace poorly-designed seats." *(Id.)* Plaintiffs claim that contrary to Commerce's regulations and well-established practice, however, Commerce refused to make the adjustment. "In the future," plaintiffs argue, "Toyota will likely incur similar, although not perhaps the exact same, expenses with respect to the sales that were made during the period of review." *(Id.* at 16.) Plaintiffs argue that because Commerce did not make an adjustment for this expense in

the present review, Toyota's "U.S. selling price does not properly reflect all selling expenses that will likely be incurred in the future with respect to these sales, thereby understating Toyota's dumping margins." *(Id.)* Accordingly, plaintiffs ask this Court to remand the *Final Results* to Commerce with instructions to reconsider its decision with respect to these alleged warranty expenses.

B. *Defendant:*

In Commerce's brief to this Court, Commerce contends this Court should reject plaintiffs' argument regarding the offset to Toyota's credit expenses as barred by the doctrine of exhaustion of remedies. "[T]here is simply no excuse," Commerce argues, for plaintiffs' failure to challenge at the administrative level Toyota's claimed offset for interest income received by TMCC on loans to unrelated dealers. (Def.'s Resp. in Partial Opp'n to Pls.' Mot. for J. Upon Agency R. (Def.'s Resp.) at 7.) In fact, Commerce maintains, in the administrative proceeding below "plaintiffs themselves drew a sharp distinction between sales to Toyota's first unrelated customer and sales to end users." *(Id.)*[8] Plaintiffs' deliberate failure to raise its arguments below, defendant reasons, "denied Commerce the opportunity to fulfill the role that is intended by the statutory scheme." *(Id.* at 8 (citations omitted).) Thus, Commerce urges this Court not to entertain plaintiffs' arguments regarding the interest income offset "unless plaintiffs can adequately explain why their failure to exhaust administrative remedies should be excused." *(Id.)*

In oral argument before this Court, however, Commerce conceded plaintiffs did raise the issue of Toyota's claimed adjustment for interest income earned on financing arrangements made with unrelated dealers at the hearing below. *(See* Tr. at 64.) Nonetheless, Commerce still maintains plaintiffs have failed to exhaust their administrative remedies. *(See id.* at 65.) According to Commerce, under 19 C.F.R. § 353.38(b),[9] "the case brief defines the scope of what is considered in the hearing in the case, and in fact the Moderator of the hearing in this case specifically cautioned the parties that they could not raise issues at the hearing that they had not raised in the case brief." *(Id.* at 64.)

Should this Court entertain plaintiffs' challenge regarding the interest income offset, Commerce contends it properly concluded that the interest income Toyota earned on the sale to an unrelated dealer was a circumstance of sale related to that sale. According to Commerce, it may

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[8] Commerce quotes from the comments section of the *Final Results:*

> Petitioners argue that Toyota's claimed credit revenue for its U.S. sales should be rejected because the credit revenue for certain sales is actually earned on sales by unrelated dealers to end-user customers and not on the sale from Toyota to the unrelated dealer. Petitioners state that Toyota sells forklifts in the United States to unrelated dealers and that the first unrelated sale is the sale from Toyota to the dealer. Petitioners contend that the purpose of this review, as stated in the questionnaire, is to examine sales by Toyota to the first unrelated customer. Petitioners argue that credit revenue earned on sales from the unrelated dealer to the end-user, which are financed through TMCC, is therefore irrelevant to this review, because the financing arranged by TMCC is a separate transaction from the sale of the forklift.

Final Results, 59 Fed. Reg. at 1379 *reprinted in* Def.'s Resp. at 8.

[9] The relevant portion of 19 C.F.R. § 353.38(b) states: "At the hearing, an interested party may make an affirmative presentation only on arguments included in that party's case brief and may make a rebuttal presentation only on arguments included in that party's rebuttal brief." 19 C.F.R. § 353.38(b) (1991).

only make a circumstance-of-sale adjustment for an expense directly related to the sale of the merchandise at issue. Commerce explains that a circumstance-of-sale adjustment for credit expense is based upon the period of time between the seller's shipment of goods to the purchaser and the seller's receipt of payment. During this time, Commerce maintains, the "seller incurs additional expenses through the process of borrowing funds pending receipt of payment or through the fact that funds are tied up due to the existence of accounts receivable." (Def.'s Resp. at 9 (citation omitted).) Thus, Commerce reasons, in this case "the credit expense adjustment should be based upon Toyota's expenses in financing the sale of forklift trucks for which it has not yet received payment. Similarly, any offset for interest income should likewise be based upon interest income that Toyota earns in financing these sales." *(Id.)*

Contrary to plaintiffs' assertions, Commerce argues, a direct relationship exists between TMS and TMCC because TMCC is wholly owned by Toyota. Commerce argues that in this situation, its usual practice "is to collapse the related entities and to consider the expenses incurred by the wholly owned subsidiary as incurred by the entity as a whole." *(Id.* at 10 (citations omitted).) Thus, Commerce contends it

> reasonably treated Toyota and its wholly owned subsidiary as a single entity and imputed the credit expenses and interest income of Toyota's wholly owned subsidiary to Toyota * * *. [T]he interest income at issue is earned by Toyota from a loan arranged by Toyota in order to finance a sale by Toyota of the merchandise subject to the antidumping duty order.

(Id.)

As to the issue of alleged warranty expenses, Commerce maintains it "failed to adequately consider plaintiffs' arguments that an adjustment should be made for the alleged warranty expenses." *(Id.* at 2.) Commerce therefore requests a remand on this issue so that it may reconsider "and, if necessary, further develop the administrative record." *(Id.)*

C. *Defendant-Intervenor:*

TMS agrees with Commerce that plaintiffs failed to exhaust their administrative remedies and urges this Court to dismiss plaintiffs' claim concerning credit revenue. TMS argues plaintiffs never briefed the issue of wholesale financing credit revenue before Commerce. In fact, TMS asserts, "[p]laintiffs drew a sharp distinction between 'wholesale' and 'retail' credit revenue before the Department—in order to assure the deduction of 'retail' credit revenue." (Def.-Intervenor's Resp. to Pls.' Mot. for J. Upon Agency R. (Def.-Intervenors' Resp.) at 4.) According to TMS, this distinction was drawn tactically, and plaintiffs relied upon it at the agency hearing. TMS complains that, as a result, Commerce "never had an opportunity to consider the issue, make a decision, and state the reasons for its decision." *(Id.)* Likewise, TMS contends, Toyota did not defend, or have the opportunity to defend, against plaintiffs' arguments concerning wholesale financing credit revenue, "and Toyota will suffer prejudice as a result if [p]laintiffs' argument is

now heard." *(Id.* at 3.) Additionally, TMS maintains plaintiffs do not fit into any of the narrowly-drawn exceptions to the exhaustion of remedies doctrine. TMS argues, "[t]his is precisely the kind of tactic that the doctrine of exhaustion of administrative remedies is designed to prevent." *(Id.* at 12 (citation omitted).)

TMS further contends Commerce's inclusion of wholesale credit revenue in Toyota's U.S. price was supported by substantial evidence on the record and is legally correct. TMS argues plaintiffs' assertions that the sales and financing were separate transactions amount to "pure speculation as to how Toyota's sales transactions occur, without regard to any facts." *(Id.* at 13.) TMS explains that "Toyota, consisting of TMS and its wholly-owned subsidiary, TMCC, incurs credit expense and earns credit revenue on its sales to its dealers, both of which were taken into account by the Department in its antidumping analysis." *(Id.* at 13–14.) This action, TMS maintains, was fully consistent with the long-standing and accepted practice of Commerce to include credit revenue in U.S. sales price. Furthermore, TMS argues, inclusion of wholesale credit revenue was proper "because credit revenue, as well as credit expense, is implicit in all sales with a delayed payment term." *(Id.* at 15.) Thus, TMS contends, the "only real issue" is whether the fact that the wholly-owned subsidiary of a sales company, instead of the sales company itself, earned the credit revenue has any bearing on Commerce's dumping analysis. *(Id.* at 15–16.)

On the issue of Toyota's retrofit expenses, TMS contends that, consistent with Commerce's long-standing practice, case law, and Commerce's regulations, Commerce properly did not make a deduction. Plaintiffs submitted no evidence, TMS argues, that any alleged retrofit expenses were incurred during the administrative review period or that the alleged expenses were related to the sales under review. In fact, TMS claims, plaintiffs admit to this Court that "'Toyota installed seats on forklift trucks sold prior to the period of review.'" *(Id.* at 19 (quoting Pls.' Br. at 16).) TMS explains that "Toyota's forklift trucks have long been manufactured and sold with the ORS" beginning well before Commerce's first administrative review. *(Id.* at 17.) Therefore, TMS reasons, "any such ORS retrofit expenses were related *solely and exclusively* to forklift trucks not subject to the administrative review at issue here." *(Id.* at 18 (citation omitted).)

TMS further contends plaintiffs' assertion that Commerce regularly adjusts antidumping calculations for expenses that are incurred during the period of review but not tied to the sales under review is legally incorrect. Instead, TMS argues, Commerce's "long-standing practice is that direct selling expenses must be directly related to the sales under consideration." *(Id.* at 18 (citations omitted).) TMS maintains that once Commerce "is certain that a directly-related warranty expense exists but that its amount is unascertainable, then, and only then, will the Department use current or historical data on unrelated warranty expenses to estimate the directly-related warranty expenses that justify

an adjustment." *(Id.* at 21.) TMS argues that here, however, any expenses incurred for the ORS retrofit are related only to prior sales. Furthermore, TMS asserts, Commerce's adjustment for warranty expenses is a "narrowly-drawn exception" that Commerce has never used to calculate unrelated product liability expenses or unrelated product recall or retrofit expenses. *(Id.* at 21 (footnote omitted).) TMS argues that the purpose for the warranty exception "is entirely inapplicable to the extraordinary one-time nature of the ORS retrofit expense." *(Id.* at 21–22.)

STANDARD OF REVIEW

The appropriate standard for the Court's review of a final determination by Commerce is whether the agency's determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States,* 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd* 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987) (citations omitted). The Court must accord substantial weight to the agency's interpretation of the statute it administers. *American Lamb Co. v. United States,* 4 Fed. Cir. (T) 47, 54, 785 F.2d 994, 1001 (1986) (citations omitted). Thus, the "agency's interpretation of the statute it has been entrusted by Congress to administer is to be upheld unless it is unreasonable." *U.H.F.C. Co. v. United States,* 9 Fed. Cir. (T) 1, 10, 916 F.2d 689, 698 (Fed. Cir. 1990) (citations omitted).

DISCUSSION

A. *Exhaustion of Remedies on the Issue of Toyota's Credit Revenue Offset for Interest Income Earned on Financing Arrangements With Unrelated Dealers:*

The threshold question this Court must decide is whether plaintiffs argued against Toyota's claimed adjustment for credit revenue earned on sales to unrelated dealers in the administrative proceeding below. Upon examination of the record, this Court finds it appears plaintiffs did advance this argument to Commerce.

Plaintiffs appear to have raised the issue at the agency hearing. While plaintiffs' consultant argued against the inclusion of credit revenue earned on financing sales to end-users by distinguishing between sales to dealers and sales to end-users,[10] plaintiffs' consultant also argued before the agency that

> the financing provided by TMCC is a separate transaction from the sale of a forklift by TMS * * *.
>
> * * * * * * *

[10] [T]his administrative review is not concerned with the sales price and the terms of sale on sales from Toyota's unrelated dealers to end-user customers. This is because these sales are the second unrelated sale in the United States.

Thus, the interest revenue that's earned by TMCC for financing these end-user sales should not be included in the [D]epartment's analysis.

(Admin. Tr. at 18); *see also Id.* at 15.

> The price for the forklift is the amount the dealer paid to TMS. The price for the loan by TMCC is the interest that the dealer paid to TMCC to make the loan. These are two separate transactions.

(Id. at 18–20.)

Defendant argues plaintiffs' raising of the issue at oral argument does not negate the exhaustion of remedies issue because plaintiffs failed to raise the issue in their brief below. However, this Court finds plaintiffs do appear to have raised the issue in their brief to the agency. Although plaintiffs' brief below does not explain that its argument captioned "The Financing Arrangement Is A Separate Transaction That Should Not Be Merged With The Sale Price For The Forklift" is leveled against adjustments for credit revenue generated on transactions with both end-users and dealers, the brief also does not expressly limit plaintiffs' argument only to revenue earned in relation to end-users. Furthermore, this generalized argument falls within a section in plaintiffs' brief titled "THE DEPARTMENT SHOULD REJECT TOYOTA'S CLAIMED CREDIT REVENUE FOR ITS U.S. SALES." Thus, this Court rejects defendant's contention.

The Court further observes it appears plaintiffs' argument that the sale and financing of forklift trucks are two distinct transactions logically would apply to transactions involving unrelated dealers as well as those involving unrelated end-users. It is not for the Court, however, to make such a determination. It does not appear from the *Final Results* that Commerce considered the argument that Toyota's offset for credit revenue earned on the financing of sales to unrelated dealers was improper because the sale and financing of the forklifts were separate transactions. For example, in the *Final Results,* Commerce characterizes petitioners' arguments as follows:

> Petitioners argue that Toyota's claimed credit revenue for its U.S. sales should be rejected because the credit revenue for certain sales is actually earned on sales by unrelated dealers to end-user customers and not on the sale from Toyota to the unrelated dealer. Petitioners state that Toyota sells forklifts in the United States to unrelated dealers and that the first unrelated sale is the sale from Toyota to the dealer. Petitioners contend that the purpose of this review * * * is to examine sales by Toyota to the first unrelated customer. Petitioners argue that credit revenue earned on sales from the unrelated dealer to the end-user, which are financed through TMCC, is therefore irrelevant to this review, because the financing arranged by TMCC is a separate transaction from the sale of the forklift.

Final Results, 59 Fed. Reg. at 1379. Similarly, in responding to the above-characterized argument, Commerce sets forth the following:

> In accordance with section 353.41 of the Department's regulations, we used the price to the first unrelated purchaser in the United States as the basis of U.S. price. Toyota's [U.S. price] was based on the price TMS/TIE charged its unrelated dealers. Therefore, we consider revenue generated as a result of the sale by the dealer to

> the end-user through a financing arrangement a separate transaction, and as such, not directly associated with the sales under review, as claimed by Toyota.

Id. It is not readily apparent from Commerce's response whether "separate transaction" refers to the sale from the dealer to the end-user, the financing, or both.[11]

Accordingly, this Court remands the *Final Results* to Commerce. On remand, Commerce is instructed to consider plaintiffs' argument that Toyota's credit revenue offset for interest income earned on financing arrangements made with unrelated dealers was improper because the financing and sale of the forklift trucks were separate transactions.

The Court further notes that in its papers to this Court, defendant explains its determination on the issue of Toyota's credit revenue offset as follows:

> [TMCC] is wholly owned by Toyota.
>
> Commerce's usual practice, in these circumstances, is to collapse the related entities and to consider the expenses incurred by the wholly owned subsidiary as incurred by the entity as a whole. Accordingly, Commerce reasonably treated Toyota and its wholly owned subsidiary as a single entity and imputed the credit expenses and interest income of Toyota's wholly owned subsidiary to Toyota. In sum, the interest income at issue is earned by Toyota from a loan arranged by Toyota in order to finance a sale by Toyota of the merchandise subject to the antidumping duty order.

(Def.'s Resp. at 9–10.) It does not appear, however, that Commerce reported any finding as to the corporate relationship of TMS, TMCC, and Toyota in the *Final Results* other than its statement that TMCC is a finance company related to TMS. *See Final Results,* 59 Fed. Reg. at 1378. Accordingly, if on remand Commerce determines the corporate relationship of TMS, TMCC, and Toyota is a determinative factor in its consideration of plaintiffs' argument against Toyota's credit revenue offset, Commerce is instructed to explain its finding as to that relationship and to point out what evidence on the record, if any, supports its finding.

Additionally, the Court observes that Commerce has not explained in its papers to this Court or in the *Final Results* the statutory and regulatory steps taken to adjust for credit revenue.[12] On remand, Commerce is instructed to provide an explanation of how it adjusts for credit revenue, and to state the statutory, regulatory, or other authority for making such adjustments.

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[11] The Court further notes that during oral argument before this Court defendant's counsel made the following comments concerning the state of the administrative record in this case:

> The reason why the Department of Commerce has consented to a remand with respect to so many issues in this case and the companion case is you've carefully gone through the record, you can't figure out what's going on, because institutionally the people who are dealing with this case have left and it's very difficult to figure out what information is there, what the information that's there represents.

(Tr. at 104–05.)

[12] Counsel for defendant did provide a partial explanation during oral argument before this Court. *See supra* note 5. This Court, however, would like Commerce to explain clearly in its remand determination the mechanics of a credit revenue offset as instructed above and in the accompanying order.

B. *Whether Toyota's Alleged Retrofit Expenses Should be Accounted for in the Dumping Calculations as Warranty Expenses:*

Plaintiffs request a remand with instructions to Commerce to reconsider its decision regarding Toyota's alleged warranty expenses. Commerce agrees, explaining it "failed to adequately consider plaintiffs' arguments that an adjustment should be made for the alleged warranty expenses and a remand is therefore proper for Commerce to revisit this issue and, if necessary, further develop the administrative record." (Def.'s Resp. at 2.) TMS opposes a remand.

On defendant's representation that it did not consider adequately plaintiffs' arguments on the alleged warranty expense issue, and in light of defendant's statement to this Court at oral argument that the administrative record in this case is unclear,[13] the Court remands this issue to the agency. On remand, Commerce is instructed to make determinations with respect to the issue of whether the expenses of retrofitting forklift trucks with occupant restraint safety seats should have been deducted from U.S. price in accordance with the instructions in the order accompanying this opinion.[14]

CONCLUSION

The Court remands *Certain Internal-Combustion Industrial Forklift Trucks from Japan,* 59 Fed. Reg. 1374 (Dep't Comm. 1994) (final results) to Commerce with the following instructions. First, Commerce is to consider plaintiffs' argument that Toyota's credit revenue offset for interest income earned on financing arrangements made with unrelated dealers was improper because the financing and sale of the forklift trucks were separate transactions. If on remand Commerce determines that the corporate relationship of TMS, TMCC, and Toyota is a determinative factor in its consideration of plaintiffs' argument against Toyota's credit revenue offset, Commerce is instructed to explain its finding as to that relationship and to point out what evidence on the record, if any, supports its finding. Commerce is further instructed to provide an explanation of how it adjusts for credit revenue, and to state the statutory, regulatory, or other authority for making such adjustments. Second, Commerce is to make determinations with respect to the issue of whether the expenses of retrofitting forklift trucks with occupant restraint safety seats should have been deducted from U.S. price in accordance with the instructions in the order accompanying this opinion.

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[13] *See supra* note 11.

[14] At oral argument, this Court instructed the parties to confer and submit to the Court proposed wording for the remand order should the Court remand on this issue. (*See* Tr. at 109.) That wording is substantially incorporated into the order accompanying this opinion.

(Slip Op. 95–135)

THE ITEM CO., INC. D/B/A BLUE RIDGE: THE ITEM CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–05–00617

[Held: Judgment for plaintiff.]

(Decided July 26, 1995)

deKieffer Dibble & Horgan (J. Kevin Horgan) for plaintiff.
Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, United States Department of Justice *(Mikki Graves Walser)* for defendant.

OPINION

MUSGRAVE, *Judge:* Plaintiff Blue Ridge challenges the classification by the United States Customs Service ("Customs") of merchandise it attempted to enter into the United States. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a) (1988).

BACKGROUND

Plaintiff attempted to enter its goods ("TV Companions") from the Peoples Republic of China into the U.S. (Port of Atlanta) on March 8, 1995. The merchandise was excluded by Customs on March 9, 1995. Plaintiff protested the exclusion on March 13, 1995. The protest was denied on April 11, 1995. Customs issued a ruling stating the basis of the exclusion was that the items were properly classifiable under headings 6304.92 and 6304.93 HTSUS ("Other furnishing articles, * * *), items which require a textile quota for entry. HQ 956658. Plaintiff filed a summons in this Court on May 1, 1995. Plaintiff requested an expedited trial which was held on July 11th and 12th, 1995.

DISCUSSION

The merchandise in question, "TV Companions," are toy-like figures in the shape of animals and humans, stuffed throughout, and are weighted with pellets on the interior bottom portion of the figure. The outer shell of the figure consists of textile material. Attached to the bottom edge of each figure is a flat textile panel with pockets. The panel is designed to hang from the weighted figure when the figure is placed on furniture, televisions, or ledges. The pockets are designed to hold small magazines—such as a television guide, and a television remote control. The figures are designed to be both humorous and decorative. The articles are entitled with such names as "TV Bunny," "TV Duck," "Channel Cat," "TV Hound," and the "TV Kitty."

Customs classified the items at issue under heading 6304.92 and 6304.93 of the 1995 Harmonized Tariff Schedule of the United States ("HTSUS"). These headings are set out below (in bold), among the other headings of chapter 63, as follows:

CHAPTER 63

OTHER MADE UP TEXTILE ARTICLES; NEEDLECRAFT SETS; WORN CLOTHING AND WORN TEXTILE ARTICLES; RAGS

I. OTHER MADE UP TEXTILE ARTICLES

6301	Blankets and traveling rugs:
*	* * * * * * *
6302	Bed linen, table linen, toilet linen and kitchen linen:
*	* * * * * * *
6303	Curtains (including drapes) and interior blinds; curtain or bed valances:
*	* * * * * * *
6304	Other furnishing articles, excluding those of heading 9404[1]:
6304.11	Bedspreads: Knitted or crocheted
*	* * * * * * *
6304.91.00	Other: Knitted or crocheted
*	* * * * * * *
6304.92.00	**Other: Not knitted or crocheted, of cotton 7.1%**
6304.93.00	**Not knitted or crocheted, of synthetic fibers 10.5%**
6304.99	Not knitted or crocheted, of other textile materials:
	Wall hangings of wool or fine animal hair:
*	* * * * * * *
	Other:
	Of vegetable fibers (except cotton):
6304.99.25	Wall hangings of jute
*	* * * * * * *
6304.99.40	Certified hand-loomed and folklore pillow covers of wool or fine animal hair
6304.99.60	Other
6305	Sacks and bags, of a kind used for the packing of goods:
*	* * * * * * *
6306	Tarpaulins, awnings and sunblinds; tents; sails for boats, sailboards or landcraft; camping goods
*	* * * * * * *

Plaintiff claims its articles should be classified among the following:

6307	Other made up articles, including dress patterns:
6307.10	Floorcloths, dishcloths, dusters and similar cleaning cloths:
6307.10.10	Dustcloths, mop cloths and polishing cloths, of cotton .....
6307.10.20	Other .....
6307.20.00	Lifejackets and lifebelts .....
6307.90	Other:
6307.90.30	Labels .....
6307.90.40	Cords and tassels .....
6307.90.50	Corset lacings, footwear lacings or similar lacings .....
6307.90.60	Surgical drapes:
*	* * * * * * *
6307.90.75	Toys for pets, of textile materials .....
6307.90.85	Wall banners, of man-made fibers .....
6307.90.89	Other:
	Surgical towels; cotton towels of pile or tufted construction; pillow shells, of cotton; shells for quilts, eiderdowns, comforters and similar articles of cotton .....
6307.90.99	**Other 7%**

[1] Heading 9404 HTSUS includes the following: Mattress supports; articles of bedding and similar furnishings (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered.

This action is before the Court for *de novo* review. 28 U.S.C. § 2640(a)(1). Customs' classification decision is presumed to be correct. The burden of proving otherwise rests with the party challenging that decision. 28 U.S.C. § 2639(a)(1) (1988). The Court is obligated to determine whether Customs' classification is correct both independently and in comparison with plaintiff's proposed classification. Where the Court determines both classifications to be incorrect, the Court may decide the correct classification or remand where it deems appropriate. *Jarvis Clark Co. v. U.S.*, 733 F.2d 873, 878, 881, *reh'g denied*, 739 F.2d 628 (Fed. Cir. 1984). In deciding the proper classification the Court first ascertains the proper meaning of the terms in the specific tariff provisions, then determines whether the merchandise at issue belongs within the given classification. *See Sports Graphics, Inc. v. U.S.*, 24 F.3d 1390, 1391 (Fed. Cir. 1994).

In ascertaining the proper meaning of a given term, the Court is required to employ the General Rules of Interpretation which require that an article be classified as follows[2]:

> 1. * * * for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions * * *
>
> * * * * * * *
>
> 3. When * * * goods are, *prima facie,* classifiable under two or more headings, * * * the heading which provides the most specific description shall be preferred to headings providing more general descriptions.
>
> * * * * * * *
>
> 4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

Additionally, the Court of Appeals for the Federal Circuit has stated the following regarding interpretation of tariff provisions:

> When a tariff term is not defined in either the HTSUS or its legislative history, the term's correct meaning is its common meaning. A court may rely upon its own understanding of terms used, and may consult standard lexicographic and scientific authorities, to determine the common meaning of a tariff term. Additionally, a court may refer to the Explanatory Notes of a tariff subheading, which do not constitute controlling legislative history but nonetheless are intended to clarify the scope of HTSUS subheadings and to offer guidance in interpreting subheadings.

Mita Copystar America v. United States, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (citations omitted). Similarly, this Court has stated that the language of a tariff term is to be given its common or commercial meaning. *THK America, Inc., v. United States*, 17 CIT 1169, ____, 837 F. Supp. 427, 431 (1993). Furthermore, a court may consider, in addition to the lan-

[2] Harmonized Tariff Schedule of the United States, General Rules of Interpretation, Rule 1, 3, 4 (1995).

guage and other pertinent indication of legislative intent, other related provisions of the tariff schedule. *West Bend Co., Div. of Dart Ind., Inc. v. United States,* 892 F.2d 69 (Fed. Cir. 1989).

The issue before the Court is whether "TV Companions" may be construed as textile "furnishings" or "other made up articles" under Chapter 63 of the HTSUS. Hence the Court must determine the meanings of those terms, employing the principles set out above, in order to ascertain the proper classification of the articles in question.

Plaintiff put forth two witnesses in support of its position. Mr. Capps is President and one of two owners of the company which designs and imports the TV Companions. He has spent most of his career in sales and marketing of novelty items and decorative items for the home. In addition, he has traveled extensively in his sales and marketing capacity to department stores and trade shows. Mr. Capps testified that the TV Companions are designed as an organizer to hold a remote control and television guide, and are intended to be used principally in the home but can also be used out of doors or in vehicles.

Mr. Capps testified regarding two catalogs of its licensors which illustrate the products licensed to carry the logo of each licensing organization. *Plaintiff's Exhibit* 4. The National Football League Merchandise Catalog 95 categorized products by, among other things, novelties and home products. That catalog listed plaintiff's merchandise not in the home products section, but the novelties section. The Looney Tune Licensee Catalog similarly listed plaintiff's company under the gifts and novelties section as opposed to the domestics and housewares section of its catalog.

In addition, plaintiff put before Mr. Capps other items not in issue but nonetheless probative of the meaning of the various tariff terms. For example, Mr. Capps testified that a shoe storage bag is made of textile, is intended to be used in the home to store and organize shoes, and can be made decorative. A pajama bag is similarly made of textile, is intended to be used in the home as a storage or organizer for pajamas, and is decorative. A bed spread, on the other hand, is intended to provide warmth and to protect the bed, and is decorative. Mr. Capps testified that the TV Companions share more of the essential characteristics of a shoe storage bag or pajama bag than those of a bedspread.

Mr. Capps testified that in his opinion, textile furnishings are primarily decorative, protective and flat items such as bed sheets, and that TV Companions were not textile furnishings. Mr. Capps also stated that to his knowledge, his company does not sell TV Companions to furnishings sections of department stores. Lastly, Mr. Capps stated that to his understanding, Chapter 63 deals with textile articles, and that the term "furnishing" within that chapter means textile furnishings.

On cross-examination, Mr. Capps admitted that heading 6304 does not state "textile home furnishings," just "furnishings," and that in his opinion the term "other" means different than the preceding headings. Mr. Capps also stated that the term "furnishings" is broad, and can

include such items as tabletop items, gift wares, wallhangings, sheets, electrical items, etc. and that his article could be considered a home furnishing in the broad sense of that term. Mr. Capps also stated that novelty items can be considered furnishings. Finally, Mr. Capps stated that the term "furnishing," means that it is useful in the home.

Mr. Bruce Reiss is President, Chairman, Chief Executive Officer, and owner of Decorite, Inc., a company which manufactures decorative home furnishings, to include pillows and textile furnishings. He spent several years in sales and marketing before becoming senior vice president of Best Products, a catalog showroom merchandising chain which grew during his tenure from $10 million to $860 million in sales. Mr. Reiss testified that textile furnishings are items such as bedding, towels, sheets, blankets; items used generally in the home as coverings; draperies, curtains, and wall hangings. Mr. Reiss stated that TV Companions are not textile furnishings. Mr. Reiss also stated that TV Companions are not similar to the items in heading 6304. He further stated that the articles in issue were not similar to bedspreads, wallhangings, or antimacassars.

On cross examination, Mr. Reiss stated that furnishings, in the broad sense include not only home textile furnishings, but all items used in the home, such as coffee pots, giftware, furniture, *etc.* Mr. Reiss testified that a shoe bag and pajama bag, in the broadest sense are furnishings. Lastly Mr. Reiss stated that if the term "furnishings," as used in the statute encompassed all of these items, than the statute is different than the commercial meaning of the term furnishings as it is used in conjunction with textiles.

Defendant put forth Professor George Leib of the Fashion Institute of Technology ("FIT"). Like the witnesses before him, Professor Leib has had a varied and long career in the retail merchandise field, to include purchasing, import product development, and eight years on the FIT faculty. Professor Leib testified that the articles in issue were "furnishings," which he defined as a product that is used with or an accessory to a basic product. Furnishings can be further delineated into various categories, such as "men's furnishings," "women's furnishings," *etc.* Professor Leib testified that a "tidy" is something that we would now call an organizer, for example items in the Rubbermaid product line. He also testified that a novelty item does not necessarily mean the item is not also a furnishing.

On cross-examination, Professor Leib stated that furnishings is a very broad category. He said that there is no such thing as a textile furnishings department within a department store. He further stated that textile furnishings means nothing more than a furnishing that is made of textiles. Professor Leib stated that the TV Companions were not similar in design, function, or use to curtains and drapes, and mosquito nets, but were similar in function to pajama bags and shoe bags. He further stated that the TV Companions were more similar to pajama bags and shoe bags than to pillow covers and wall hangings. Lastly Professor Leib

insisted his definition of furnishings was narrower than that of the statute, despite stating that a shoe bag is a furnishing, even though the Explanatory Notes do not classify it as such.

From the testimony alone, it is uncertain how broad the term "furnishing" is as it is used in the tariff schedule. While plaintiff's witnesses testified that the term referred to textile home furnishings such as towels, sheets, bedspreads, curtains and drapes, they admitted that TV Companions could be considered a furnishing in the broad sense of home furnishing. Defendant's witness testified that there is no commercial category for textile home furnishings, and that the term "furnishing," as used under heading 6304 means any furnishing made of textile.

To help in resolving the conflict in testimony, the Court turns to the related provisions of Chapter 63. Upon examining the entire chapter, it is clear that for the article to be classified under heading 6304 it must fall somewhere between bedspreads (6304.11) and wall hangings (6304.99), and that these items are considered "other" made up textile furnishing articles when referenced to blankets and traveling rugs (6301); bed linen, table linen, toilet and kitchen linen (6302); curtains, blinds, and valances (6303). Furthermore, the exclusion of the items of heading 9404[3] from heading 6304 demonstrates that heading 6304 is sufficiently narrow so as not to include textile articles that have springs, or are stuffed or internally fitted; and that the term "furnishings" in heading 6304 is not so broad as to include anything used in the home that is made of textile material, as is urged by defendant.

The remaining headings of Chapter 63 also support such a construction. Sacks and bags (heading 6305) could certainly be considered furnishings under the definition urged by defendant. Heading 6307 includes items as disparate as floorcloths and dishcloths (6307.10), which could also presumably be considered furnishings; lifejackets (6307.20); and toys for pets (6307.90.75). This heading is intended as a basket type provision for articles that do not fit within the other headings of Chapter 63, and more readily accommodates the broad array of items defendant would have termed furnishings and placed under heading 6304.

That TV Companions do not fit under heading 6304 is further supported by the Explanatory Notes[4] for each of the headings claimed by defendant and plaintiff respectively. The Explanatory Notes for heading 6304 state as follows:

> These articles include wall hangings and textile furnishings for ceremonies (*e.g.*, weddings or funerals); mosquito nets; bedspreads (but **not including** bed coverings of **heading 94.04**); cushion covers, loose covers for furniture, antimacassars; table covers **(other than** those having the characteristics of floor coverings * * *); mantlepiece runners; curtain loops; valances **(other than** those of **heading 63.03)** (bold in original).

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[3] See footnote 1, *supra*.

[4] *Harmonized Commodity Coding and Description System.*

These items, besides being made of textiles, all share certain essential characteristics, *i.e.*, they are primarily flat items which serve protective, as well as decorative functions. These primary characteristics are not the same as the principal characteristic of TV Companions, which, as testified to by all three witnesses, is to aid in the organization or storage of magazines and remote controls.

The Explanatory Notes to heading 6307 state, among other things, as follows:

> This heading covers made up articles of any textile material which are **not included** more specifically in other headings * * *. It includes, in particular:
>
> (1) Floor cloths, dish cloths, dusting cloths and similar cleaning cloths * * *
> (2) Life-jackets and life-belts.
> (3) Dress patterns made of stiff canvas * * *
> (4) Flags, pennants and banners, including bunting for entertainments * * *
> (5) Domestic laundry or shoe bags, stocking, handkerchief or slipper sachets, pyjama or nightdress cases and similar articles.
> (6) Garment bags (portable wardrobes) * * *
> * * * * * * *
> (12) Tea cosy covers.
> (13) Pin cushions.
> * * * * * * *

It is clear that beyond being made of textile, the items in this Note have little in common. TV Companions, however, do share the principal characteristic of such items as shoe bags and pajama bags. Hence, TV Companions seem more properly placed amongst these items than amongst the items listed in the Explanatory Note to heading 6304.

When the testimony of all three witnesses is viewed with respect to all of the headings under Chapter 63 and the Explanatory Notes thereto, it is clear to this Court that Congress did not intend for heading 6304 to include items with characteristics other than flat, protective and decorative. Accordingly, this Court finds that plaintiff has overcome its burden of proving Customs classification incorrect. This Court further finds that the articles in issue are properly classified under heading 6307.90.9989, as these articles are more akin to the articles set forth under heading 6307, and the Explanatory Notes thereto.

CONCLUSION

For the foregoing reasons, this Court finds the articles in issue classifiable under heading 6307.90.9989. Customs' denial of protest is overruled. Customs is directed to so reclassify the articles and entries in issue accordingly.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C95/61 7/24/95 Aquilino, J.	Avesta, Inc.	93–09–00526	607.7606 9.5% 606.000 .1% 606.0200 .3%	606.6910 5.1% plus additional duties 606.000 .1% 606.0200 .3%	Agreed statement of facts	Baltimore Stainless steel sheet bar

Index

Customs Bulletin and Decisions
Vol. 29, No. 33, August 16, 1995

U.S. Customs Service

Treasury Decisions

General Notices

CUSTOMS RULINGS LETTERS

U.S. Court of International Trade

Slip Opinions

Abstracted Decisions

U.S. G.P.O. 1995–387–567–00051